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# THE CONSTITUTIONALITY OF PUBLIC SCHOOL FINANCING LAWS: JUDICIAL AND LEGISLATIVE INTERACTION

## I. Introduction

Several recent cases have presented constitutional challenges to state laws regulating public school funding.<sup>1</sup> Opponents of these laws charge that state funding schemes which rely primarily upon revenue derived from local property taxes create marked disparities in the amount of money spent per pupil among school districts within the same state.<sup>2</sup> It is argued that these disparities in per pupil expenditures create unequal educational opportunities<sup>3</sup> in violation

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1. See, e.g., *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Seattle School Dist. v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978).

2. The amount of revenue spent on behalf of school students is related to the amount of revenue generated by local property taxes within the school district. Such tax revenue is attributable to: 1) variations in the tax rate imposed by districts; and 2) the value of taxable property within a district. An increase in the property tax rate, or in the value of taxable property, will increase the amount of revenue generated for students. See generally *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 73-74 (1973) (Marshall, J., dissenting).

3. The quality of a child's education has been held by several state courts to be a function of the revenue spent per pupil by a school district. See e.g., *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); *Horton v. Meskill*, 173 Conn. 615, 376 A.2d 359 (1977). The United States Supreme Court, however, has characterized this proposition as "unsettled and disputed" and has indicated that it is "a matter of considerable dispute among educators and commentators." *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 23-24 n.56 (1973). Proponents of the proposition that quality of education is related to expenditure levels argue that property-rich districts can afford a greater number of more qualified teachers than their property-poor counterparts. Opponents argue, however, that higher teacher-student ratios do not necessarily improve the quality of the student's education. Further, they dispute the proposition that a highly paid teacher is better equipped to teach than one paid comparatively less money.

The Supreme Court has accepted the proposition that "there is a correlation . . . between revenue and quality of education received up to the point of providing the recognized essentials in facilities and academic opportunities. . . ." *Id.* at 47 n.101. The Court has questioned, however, whether variations in pupil-teacher ratios and salary levels have an effect on the quality of education. *Id.* at 47. According to the Court "there appears to be few empirical data that support the advantage of any particular pupil-teacher ratio or that document the existence of a dependable correlation between the level of public school teacher's salaries and the quality of their classroom instructions." *Id.* The Court has stated that the "ultimate wisdom" in the quality-cost controversy was not likely to be "divined for all time." Accordingly, the Court has refused to impose on the States "inflexible constitu-

of both state and federal equal protection clauses<sup>4</sup> and state education guarantees.<sup>5</sup>

The legal basis upon which courts have invalidated state public school finance laws varies among states. Since *San Antonio School District v. Rodriguez*,<sup>6</sup> however, it has been difficult to fashion an argument against public school finance laws based upon alleged violations of the fourteenth amendment of the United States Constitution. In *Rodriguez*, a group of parents whose children attended public school in Texas brought a class action on behalf of all children residing in school districts with low property tax bases.<sup>7</sup> The parents argued that their children were denied equal protection under the Federal Constitution because the disparate revenues generated among school districts within Texas resulted in unequal educational opportunities among students throughout the state.<sup>8</sup> The

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tional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Id.* at 43. See also C. JENCKS, *INEQUALITY* (1972); C. SILBERMAN, *CRISIS IN THE CLASSROOM* (1970); U.S. OFFICE OF EDUCATION, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

4. U.S. CONST. amend. XIV, § 1; see, e.g., N.Y. CONST. art. XI, § 1.

5. Educational guarantees, contained in many state constitutions, are commitments made by states regarding the quality of education to be offered. See, e.g., N.J. CONST. art. VIII, § 4, ¶ 1. The Education guarantee of one state constitution reads: "The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools." OR. CONST. art. VIII, § 3. Compare N.Y. CONST. art. XI, § 1 with N.J. CONST. art. VIII, § 4, ¶ 1. See also notes 49 & 103 *infra* and accompanying text.

6. 411 U.S. 1 (1973).

7. *Id.* at 5. Defendants included the Texas State Board of Education, the Commissioner of Education, the Texas State Attorney General, and the Board of Trustees of the school boards of the plaintiffs' districts.

8. *Id.* at 47. The Texas legislature adopted a system of financing referred to as the "foundation program." California, New Jersey and New York have also adopted the foundation program as a system for financing public school education. In Texas, the state contributed 80% of the total school revenue while local school districts contributed nearly 20%. Each school district is required to make a contribution in accordance with its tax-paying ability. A district's taxpaying ability is determined by a complex formula which takes into account "the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent considers each county's share of all property in the State." *Id.* at 10. Each district's contribution is computed based upon the above formula, and the value of property situated in such district. The revenue generated from local property tax is contributed to a collective fund. The money from this fund, along with state contributions, is then distributed by the state to each school district to provide for a minimum per pupil expenditure among all school districts. Although a minimum per pupil expenditure exists in Texas, each school district has the right to tax beyond the rate

United States Supreme Court rejected this argument and upheld the Texas public school finance law.<sup>9</sup> The Court held that disparities in the amount of money spent per pupil among school districts within a state do not create "suspect classifications"<sup>10</sup> based on wealth and that public school education is not a fundamental right guaranteed either explicitly or implicitly by the United States Constitution.<sup>11</sup> The statute, therefore, did not require strict scrutiny under the equal protection clause of the fourteenth amendment.<sup>12</sup>

The Court's inquiry was limited to whether the operation of the Texas statute was rationally related to its purpose. The Court concluded that financing the Texas public schools through local property revenue serves the purpose of allowing local districts to determine the kind of educational experience their students will receive. The Court held that the operation of the Texas statute was rationally related to this purpose.<sup>13</sup>

Since the *Rodriguez* decision, most state courts sustaining constitutional challenges to public school finance laws have based their decisions on equal protection and educational guarantees embodied

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prescribed by the state. The proceeds from this additional revenue remain within the school district which generates the tax. "Property-rich" school districts thereby have an opportunity to generate more money for education than their property-poor counterparts.

9. *Id.* at 55.

10. *Id.* at 28.

11. *Id.* at 35.

12. *Id.* at 35. Justice Marshall challenged the Court's position that the equal protection clause permits only a strict scrutiny or rational basis analysis. *Id.* at 98-99 (Marshall, J., dissenting).

He suggests that interests not specifically mentioned in the constitution should be considered fundamental where expressly guaranteed rights depend upon such interests for their survival. "[A]s the nexus between the specific constitutional guarantee and the nonconstitutional interests draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied where the interest is infringed on a discriminatory basis must be adjusted accordingly." *Id.* at 102-03. Justice Marshall maintains that the degree of judicial scrutiny to be applied by the Court depends as well on the "invidiousness of the particular classification" involved. *Id.* at 110. Since education bears on a citizen's ability to speak freely and to vote, Justice Marshall would demand that the Texas law be strictly scrutinized by the Court. *Id.* at 112-14.

13. 411 U.S. at 55. Justice Marshall rejects the application of the rational basis test in the factual situation presented in *Rodriguez*. He questions whether the Texas schools genuinely enjoy local control as "statewide laws regulate . . . the most minute details of local public education." *Id.* at 126. Further, he argues that "the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district a factor over which local voters can exercise no control." *Id.* at 128.

*Cahill*,<sup>19</sup> will illustrate the impact courts can have on the legislative process.

### A. *Serrano v. Priest*

In *Serrano v. Priest*, plaintiffs challenged the constitutionality of the California public school finance statute<sup>20</sup> which depended primarily upon local taxes to fund public education.<sup>21</sup> The statute guaranteed a minimum expenditure per pupil within the state.<sup>22</sup> To help effectuate this guarantee, the state provided all districts with a flat grant for each student.<sup>23</sup> In addition, the state provided certain property-poor districts with "equalizing aid" to enable them to reach an established minimum level of expenditure per pupil.<sup>24</sup> The court held that, notwithstanding the minimum expenditure pro-

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19. 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

20. The public school financing statute operated in a manner similar to the Texas model. See note 8 *supra*. The state guaranteed a minimum level of expenditure per pupil, and local districts were permitted to supplement state contributions. See note 22 *infra*. Property-rich districts therefore had the capacity to generate more money for education. 18 Cal. 3d at 746, 557 P.2d at 938, 135 Cal. Rptr. at 354.

21. 18 Cal. 3d at 737, 557 P.2d at 932, 135 Cal. Rptr. at 348. Plaintiffs argued that students receive unequal protection under the law because the amount of revenue expended per student for education depends upon the fortuitous presence of property wealth within a school district. See note 2 *supra*. The *Serrano* court held that disparities in per pupil expenditures affect the quality of educational opportunities offered. 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355. See note 26 *infra* and accompanying text.

22. 18 Cal. 3d at 743, 557 P.2d at 935, 135 Cal. Rptr. at 351. The minimum expenditure guaranteed for elementary school students was \$765 and for high school students the amount was \$950. *Id.* at 742, 557 P.2d at 935, 135 Cal. Rptr. at 351.

23. The flat grant amounted to an annual contribution per pupil of \$125. *Id.* at 739, 557 P.2d at 933, 135 Cal. Rptr. at 349.

24. *Id.* The amount of "equalizing aid" a property poor district received depended upon how much revenue it raised by local property taxation. "Equalizing aid" amounted to the difference between the revenue raised locally and the guaranteed minimum amount that the state required all districts to spend per pupil. Such aid does not equalize the amount of revenue spent per pupil among all districts; rather, it only provides districts with the minimum per pupil expenditure established by the public school finance act. The amount of equalizing aid which a district received was determined by a complex formula. The state would determine

how much local property tax revenue would be generated if [a] district were to levy a hypothetical tax at a rate of \$1 on each \$100 of assessed valuation in elementary school districts and \$.80 per \$100 in high school districts. . . . To that figure, [the state] adds the \$125 per-pupil basic aid grant. If the sum of those two amounts is less than the foundation program minimum for that district, the state contributes the difference.

*Id.* at 739, 557 P.2d at 933, 135 Cal. Rptr. at 349.

in state constitutions, rather than on the equal protection clause of the Federal Constitution.<sup>14</sup> One conspicuous exception is the case of *Board of Education v. Nyquist*<sup>15</sup> (hereinafter referred to as "*Levittown*"). In this case, a Nassau County Supreme Court judge held that New York's public school finance law was unconstitutional because it violated both federal and state equal protection guarantees. This Note, focusing primarily on the *Levittown* decision, will demonstrate that the constitutional basis upon which courts invalidate public school finance laws affects the choices available to state legislatures when considering various school finance plans recommended by experts. This Note will conclude that in the complex field of public school financing, the courts should expand, rather than restrict, the legislature's freedom to choose among competing school finance schemes.

## II. The State Court Decisions

When called upon to review the constitutionality of a statute, the judiciary must determine whether federal or state constitutional guarantees, explicitly or implicitly expressed, have been violated.<sup>16</sup> Notwithstanding this responsibility, courts may not judge the merits of a particular statute in review.<sup>17</sup> A decision invalidating a statute on a constitutional basis will, however, affect present or future legislation by creating constitutional demands. Consideration of two state court decisions, *Serrano v. Priest*<sup>18</sup> and *Robinson v.*

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14. See, e.g., cases cited in note 1 *supra*.

15. 94 Misc. 2d 466, 408 N.Y.S. 2d 606 (Sup. Ct. Nassau County 1978), appeal docketed, (App. Div. 2d Dep't Nov. 9, 1979).

16. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

17. *Younger v. Harris*, 401 U.S. 37 (1971); *Bruinooge v. U.S.*, 550 F.2d 624 (Ct. Cl. 1977); *Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977).

18. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). *Serrano v. Priest* has an extensive history in the California courts. In 1971, the California school finance system was the target of a constitutional challenge, but the trial court hearing the case dismissed the action for failure to state a claim upon which relief could be granted. On appeal, the California Supreme Court remanded the case for trial, holding that the public school finance statute denied certain students a fundamental right to education and discriminated against a suspect classification based on wealth. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). This case is known as *Serrano I*. Following the *Rodriguez* decision in 1973, the California courts were compelled to reassess the holding in *Serrano I* that a finance statute was unconstitutional because it violated a student's fundamental right to education under the fourteenth amendment. The California case decided after *Rodriguez* is known as *Serrano II* and is discussed in this Note.

vided by the foundation program, there existed marked disparities in the dollar amount spent per pupil among the districts.<sup>25</sup> The court accepted the proposition that a positive correlation exists between "expenditures per pupil" and the "quality and extent of availability of educational opportunities."<sup>26</sup> Although it was stated that "an equal expenditure level per pupil in every district is not educationally sound or desirable because of differing educational need,"<sup>27</sup> the court found that the financing system violated the state equal protection clause by creating "substantial disparities in the quality and extent of availability of educational opportunities."<sup>28</sup>

The *Serrano* court, in deference to the United States Supreme Court's holding in *Rodriguez*, maintained that the California statute could not be held unconstitutional based on the equal protection clause of the fourteenth amendment.<sup>29</sup> The court argued, however, that the equal protection clause of the California State Constitution demanded greater judicial scrutiny than the equal protection clause

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25. *Id.* at 746, 557 P.2d at 938, 135 Cal. Rptr. at 354.

26. *Id.* at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355. There is a dispute among state courts on this issue. *See, e.g.,* *Milliken v. Green*, 390 Mich. 389, 212 N.W.2d 711 (1973). In *Milliken*, the Michigan Supreme Court vacated an earlier judgment in which it declared the Michigan public school financing law unconstitutional under the state equal protection clause. The court argued that the evidence relied upon in the earlier decision was based on the premise that unequal expenditures per pupil resulted in unequal educational opportunities. Upon reviewing its earlier decision, the court apparently retreated from this notion, stating, [t]he relationship of expenditures to educational opportunity is being sharply questioned and is the topic of much current debate among educators. We would be ill-advised, at this time, to intrude our personal suppositions into this debate in what could only be, in view of our limited judicial function, a heavy-handed manner.

*Id.* at 405, 212 N.W.2d at 719. The Idaho Supreme Court, in *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975) also refused to address the validity of the premise that unequal expenditures per pupil result in unequal educational opportunities. The court stated:

[B]ecause of this ongoing argument as to the relationship of funds expended per-pupil . . . to the quality of educational opportunity, we refuse to venture into the realm of social policy under the guise of equal protection of the laws or fundamental right to education. The courts are ill-suited to a task which is the province of the legislature.

*Id.* at 800, 537 P.2d at 642. The court held that the Idaho constitution requires only that the state establish a "general, uniform and thorough system of public, free common schools." *Id.* at 806, 537 P.2d at 648. It concluded that the evidence did not demonstrate that the state had failed to comply with the state constitutional mandate. *See also* note 3 *supra*.

27. 18 Cal. 3d 747, 557 P.2d at 939, 135 Cal. Rptr. at 355.

28. *Id.*

29. *Id.* at 762, 557 P.2d at 949, 135 Cal. Rptr. at 365. In *Levittown*, however, the Nassau County judge makes a convincing argument for application of the fourteenth amendment as a basis for invalidating a state finance law. 94 Misc. 2d at 530, 408 N.Y.S.2d at 641.

of the Federal Constitution.<sup>30</sup> The court held, on that basis, that education in California is recognized as a fundamental right<sup>31</sup> and that the constitutionality of the public school finance statute was therefore subject to strict judicial scrutiny. Only a compelling state interest would justify the existence of unequal educational opportunities caused by the operation of the public school finance statute.<sup>32</sup> The court implicitly considered the proposition that local fiscal control over education may constitute a compelling state interest. It rejected the state's contention, however, that such control was achieved under the California statute, noting that only the property rich districts are "truly able to decide how much [they] really care about education."<sup>33</sup> The court concluded, therefore, that the California public school finance law violated state equal protection guarantees.<sup>34</sup>

The court added a second reason for invalidating the California statute. Determining that a "suspect classification" was established on the basis of district wealth,<sup>35</sup> the court held that an inequality among school districts<sup>36</sup> existed in violation of the state equal protection clause. Underlying the court's determination was the premise that the finance system "gives high wealth districts a substantial advantage in obtaining higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high-quality buildings."<sup>37</sup> The court's decision to go a step beyond its fundamental right analysis and to embrace a suspect classification argument based on wealth may have been ill-advised. As a result of this decision, all future finance programs in California must be "fiscally neutral," *i.e.*, they may not result in wealth-related spending disparities.<sup>38</sup> This aspect of the

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30. 18 Cal. 3d at 762, 557 P.2d at 949, 135 Cal. Rptr. at 365. The concept that a state constitution may demand greater judicial scrutiny than the fourteenth amendment is recurring in public school finance cases. *See, e.g.*, *Horton v. Meskill*, 72 Conn. 615, 376 A.2d 359 (1977) and *Board of Education v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S. 2d 606 (Sup. Ct. Nassau County 1978).

31. 18 Cal. 3d at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

32. *Id.* at 768, 557 P.2d at 953, 135 Cal. Rptr. at 369.

33. *Id.* at 769, 557 P.2d at 953, 135 Cal. Rptr. at 369.

34. *Id.* at 776-77, 557 P.2d at 958, 135 Cal. Rptr. at 374.

35. *Id.* at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

36. *Id.*

37. 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355.

38. The *Serrano* court identified several finance methods which would meet this criterion. They are:



court's decision is significant because fiscally neutral finance schemes have been criticized for jeopardizing local control over education<sup>39</sup> and for failing to promote educational equality among school districts.<sup>40</sup> Notwithstanding the fiscally neutral criterion imposed by the *Serrano* decision, the present California public school finance scheme does not fully comply with the *Serrano* mandate.<sup>41</sup>

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" (1) full state funding, with the imposition of a statewide property tax;

(2) consolidation of the . . . school district . . . [and] boundary realignments to equalize assessed valuations of real property among all school districts;

(3) retention of the present school district boundaries but the removal of commercial and industrial property from local taxation for school purposes and taxation of such property at the state level;

(4) school district power equalizing . . . ;

(5) vouchers; and

(6) some combination of two or more of the above."

*Id.* at 747, 557 P.2d 938-39, 135 Cal. Rptr. 354-55.

39. See Carrington, *Financing The American Dream: Equality And School Taxes*, 73 COLUM. L. REV. 1227 (1973), where Prof. Carrington sets forth the persuasive argument that statewide funding is incompatible with local control over education. See B. LEVIN, T. MULLER, W. SCANLON, & M. COHEN, *PUBLIC SCHOOL FINANCE: DISPARITIES AND FISCAL ALTERNATIVES* (1972). See generally 38 L. & CONTEMP. PROB. 293-581 (1974), where a symposium was held on the subject of public school finance reforms. But see N.Y. STATE COMM'N ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK STATE, *THE FLEISCHMAN REPORT* (1973), and J. COONS, W.H. CLUNE & S.D. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970), where fiscally neutral schemes are vigorously advocated.

40. One fiscally neutral financing alternative in particular, district power equalizing (DPE), has been sharply denounced by critics. DPE establishes a special arrangement whereby all districts are endowed with an equal ability to raise revenue. Under DPE, two school districts with unequal property tax bases will generate equal revenue for education while levying taxes at the same rate, because the property-poor districts receive supplemental aid from the state to compensate them for their less valuable tax base. Critics argue that DPE focuses upon tax equality but not upon educational equality. Districts choosing to levy taxes at different rates, for example, will generate differing amounts of revenue. Disparities in revenue for financing public school education may therefore exist under a fiscally neutral scheme, because local tax efforts may vary among localities. See generally Fredman & Lee, *The Ambiguity of Serrano: Two Concepts of Wealth Neutrality*, 4 HASTINGS CONST. L.Q. 487, 496-97 (1977) and Sugarman, *Principled Serrano Reform*, 4 HASTINGS CONST. L.Q. 511 (1977) for criticism of the California Court's decision. E.g., Briggs & Main, *Serrano II—Case of Missed Opportunities?*, 4 HASTINGS CONST. L.Q. 453, 478 (1977). For an overview of the subject, see Andrews, *Serrano II Equal Access to School Resources and Fiscal Neutrality—A View From Washington State*, 4 HASTINGS CONST. L.Q. 425 (1977).

41. The California legislature revised its public school financing law after *Serrano*, and enacted a "fiscally neutral" plan. See 1977 Cal. Stats. chs. 292, 894. The new law enjoyed a short life because soon after its enactment, the California voters approved "Proposition Thirteen" which amends Article Thirteen of the California Constitution. The amendment radi-

The suspect classification analysis based on district wealth prohibits the legislature from enacting a school financing scheme which produces wealth-related spending disparities. If the *Serrano* court had merely held that education is a fundamental right protected by the state equal protection clause, it would not have so restricted the legislature.<sup>42</sup> Complex decisions concerning the most effective method for financing public school education and for satisfying state equal protection requirements should not be made by the judiciary. Rather, the legislature provides the proper forum in which to debate the merits of various public school finance plans.

### B. *Robinson v. Cahill*

The *Serrano* court imposed a negative duty on the California legislature by prohibiting the passage of a wealth-related finance remedy. *Robinson v. Cahill*,<sup>43</sup> on the other hand, imposed an affirmative duty on the New Jersey legislature by requiring passage of a finance law guaranteeing a "thorough and efficient"<sup>44</sup> education for all students. In *Robinson*, an action was brought by the parents of a child who attended the New Jersey public schools.<sup>45</sup> The plaintiffs charged that the New Jersey state aid formula<sup>46</sup> made a child's

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cally altered statewide financing for all social programs and undermined the operation of the fiscally neutral scheme. Interview with Jack Ross, California State Department of Education, (Nov. 16, 1979). The California legislature has sought to minimize the effect of Proposition Thirteen upon public school financing. See 1979 Cal. Stats. ch. 282.

42. See *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977). There, the Connecticut Supreme Court invalidated a state public school finance law using only a fundamental right analysis. It stated:

Whether we apply the 'fundamental' test adopted by *Rodriguez* or the pre-*Rodriguez* test under our state constitution . . . or the 'arbitrary' test applied by the New Jersey Supreme Court . . . we must conclude that in Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized.

*Id.* at 646, 376 A.2d at 373. In holding only that the Connecticut public school finance statute was unconstitutional because it infringed upon a fundamental right, the *Horton* court remained silent on the issue of which specific finance scheme would satisfy equal protection guarantees. Although the fundamental right analysis did not require that future financing in Connecticut be fiscally neutral, the legislature nevertheless enacted such a scheme. See CONN. GEN. STAT. §§ 10-261 to 10-266d (West Supp. 1979).

43. 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

44. See text accompanying note 49 *infra*.

45. Municipal officials also joined in the action on the plaintiffs' side.

46. The New Jersey state aid formula resembled the California foundation program in that minimum support aid was provided to all districts through state funding. Equalization aid based on a guaranteed assessed valuation was provided under the New Jersey foundation

education a function of the fortuitous presence of property wealth within a school district. Unlike the *Serrano* court, the New Jersey court dismissed state equal protection arguments advanced by plaintiffs.<sup>47</sup> However, the court invalidated the New Jersey statute based on the education clause of the state constitution.<sup>48</sup>

The educational mandate of the New Jersey State Constitution provides that, "[t]he legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the age of five and eighteen years."<sup>49</sup> The court stated that the guarantee "must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."<sup>50</sup> The court relegated to the legislature the responsibility to "define in some discernible way the educational obligation" of the state.<sup>51</sup> The court's decision to require the New Jersey legislature to define the educational obligation of the state caused delay in the passage of remedial legislation and created uncertainty as to what kind of education was required by the state constitution.

The *Robinson* decision was issued in April 1973; it was not until January 1976, however, that the New Jersey court gave its approval to a new public school finance statute.<sup>52</sup> In the interim, the court established a one-year legislative deadline during which period a new public school finance law was to have been passed,<sup>53</sup> extended the deadline for an additional year,<sup>54</sup> and ordered a provisional remedy when the second deadline was missed by the legislature.<sup>55</sup> The provisional remedy required the distribution of nearly \$300 million

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program. See State School Incentive Equalization Aid Law (Bateman Act). 1970 N.J. Laws ch. 234.

47. 62 N.J. at 500, 303 A.2d at 287. The *Robinson* court held that education is not a fundamental right in New Jersey; additionally, the court found that a suspect classification based upon district wealth did not exist. The court stated that such a holding would threaten the present system of home rule. *Id.* at 493-501, 303 A.2d at 283-87.

48. *Id.* at 519-20, 303 A.2d at 297-98.

49. *Id.* at 508, 303 A.2d at 291.

50. *Id.* at 515, 303 A.2d at 295.

51. *Id.* at 519, 303 A.2d at 297.

52. *Robinson v. Cahill*, 69 N.J.449, 355 A.2d 129 (1976).

53. *Robinson v. Cahill*, 63 N.J. 196, 306 A.2d 65 (1973).

54. *Robinson v. Cahill*, 67 N.J. 35, 335 A.2d 6 (1975).

55. *Robinson v. Cahill*, 69 N.J. 133, 351 A.2d 713 (1975).

in aid for the 1975-1976 school year. In addition, the *Robinson* court's decision to relegate to the legislature the responsibility for defining the meaning of a "thorough and efficient" education created uncertainty as to what kind of education was constitutionally required in New Jersey. In response, the legislature promulgated ten vague guidelines purporting to define the meaning of "thorough and efficient."<sup>56</sup> The standards promulgated by the legislature, because they represent no more than vague educational ideals, preclude a realistic assessment of the meaning behind the state's constitutional guarantee.

The New Jersey legislature passed a finance statute which allows for considerable financial disparities among school districts. Under the new act,<sup>57</sup> equalizing aid is provided to less than two-thirds of New Jersey's school districts.<sup>58</sup> In addition, no more than sixty-five percent of a district's total educational budget will be provided by the state regardless of need;<sup>59</sup> this provision may be highly detrimental to property-poor districts. Moreover, the legislature failed to take into account the costs of police and fire protection and other "municipal overburdens" suffered by large cities.<sup>60</sup> The New Jersey experience illustrates the problems inherent in requiring a legisla-

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56. The guidelines are:

- a. Establishment of educational goals at both the State and local levels;
- b. Encouragement of public involvement in the establishment of educational goals;
- c. Instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills;
- d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;
- e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;
- f. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies;
- g. Qualified instructional and other personnel;
- h. Efficient administrative procedures;
- i. An adequate State program of research and development; and
- j. Evaluation and monitoring programs at both the State and local levels.

N.J. STAT. ANN. § 18A:7A-5 (West Supp. 1979-80).

57. *Id.* § 18A:7A-1 to 7A-33.

58. See generally Martell, *School Finance Reform: Robinson v. Cahill*, 13 URB. L. ANN. 139, 154-56 (1977); see also Robinson v. Cahill, 69 N.J. 449, 512-62, 355 A.2d 129, 163-89 (1976) (Pashman, J., dissenting).

59. N.J. STAT. ANN. § 18A:7A-3 (West Supp. 1976).

60. 69 N.J. at 553-57, 355 A.2d at 184-86. See note 67 *infra* and accompanying text for a discussion of the concept of "municipal overburden."

tive body to define, in relative terms, the extent of a state's commitment to education.<sup>61</sup> The legislative response is a vague proclamation under which a variety of public school finance schemes may exist. The result is that the ultimate public school finance scheme is modeled after vague educational guidelines which guarantee only the right to a certain quality of education, rather than the constitutional right, as interpreted by the New Jersey Supreme Court, to equality of educational experience.<sup>62</sup>

### C. *Board of Education v. Nyquist*

*Board of Education v. Nyquist* (Levittown) was commenced by several parents whose children attended the public schools in New York.<sup>63</sup> The plaintiffs sought to invalidate the state public school aid formula which employed a foundation program as a financing model.<sup>64</sup> They maintained that the formula made a child's educa-

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61. The Supreme Court of Washington State invalidated its state public school finance law based upon the educational guarantee contained in the Washington State constitution. *Seattle School Dist. v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978). The guarantee reads: "it is the paramount duty of the state to make ample provision for the education of all children residing within its borders. . . ." WASH. CONST. art. 9, § 1. The court failed to explain the meaning behind the education article, except to the extent that it adopted the trial court's vague definition of certain terms contained within the guarantee. See 90 Wash. 2d at 515-16, 585 P.2d at 93-94. The court left to the legislature the responsibility for "defining and giving substantive meaning" to the state educational guarantee. *Id.* at 519, 585 P.2d at 95.

The Washington court's decision to invalidate the public school law based upon the state education clause may cause delay in the passage of remedial legislation and create uncertainty as to what kind of education is required by the Washington State constitution. The court was probably cognizant of the delay caused by the *Robinson* holding. In September 1978, when it issued its decision, the court provided that the legislature would have until July 1, 1981 in which to pass a remedial statute. 90 Wash. 2d at 538, 585 P.2d at 105.

62. It is interesting to note that the *Robinson* court, in its original decision, held that "an equal educational opportunity for children was precisely in mind" when the educational guarantee was included in the state constitution. 62 N.J. at 513, 303 A.2d at 294. Despite this holding, the *Robinson* court ultimately approved the present New Jersey finance scheme which falls considerably short of providing equalizing aid to all school districts.

63. 94 Misc. 2d 475, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

64. *Id.* at 478, 408 N.Y.S.2d at 610. The New York law guaranteed a minimum per pupil expenditure of \$1,200. If school districts taxed property in the amount of 15 cents on one hundred dollars of value per annum, the state was committed to making up the difference. Further, flat grants were provided to all school districts regardless of ability to pay. In addition, the state finance law contained "save harmless" provisions which provided that a district would not receive less aid from the state than it had received in previous years. Additional aid was provided for special education programs as well as for capital expenses. Since the assessed value of property was a significant factor in raising school revenue, it was inevitable that the property-rich districts would raise more school revenue than the property-

tional opportunity a function of the fortuitous presence of property wealth in a school district in violation of equal protection guarantees.<sup>65</sup> The plaintiffs were joined by several boards of education from urban districts and municipal officials ("plaintiff-intervenors"),<sup>66</sup> who further argued that the state aid formula discriminated against students in large cities because it ignored the "municipal" and "educational overburdens" endemic to urban areas.<sup>67</sup> The alleged "municipal overburdens" included the high cost of police and fire protection,<sup>68</sup> and the large expenditures made by cities for public assistance,<sup>69</sup> health care,<sup>70</sup> and mass transit.<sup>71</sup> The alleged "educational overburdens" included the high incidence of "impaired learning readiness,"<sup>72</sup> "impaired mental and emotional health,"<sup>73</sup> and "impaired physical health"<sup>74</sup> suffered predominantly by urban students.<sup>75</sup>

### 1. Fourteenth Amendment Arguments

The *Levittown* court rejected plaintiff's argument that the New York public school finance law was unconstitutional because it violated fundamental guarantees protected by the fourteenth amendment of the Federal Constitution.<sup>76</sup> Citing *Rodriguez*, the court re-

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poor districts. *Id.* at 483-86, 408 N.Y.S.2d at 613-14. For a more comprehensive treatment of the New York finance program, see Comment, Board of Education, *Levittown Union Free School District v. Nyquist: A Return to Federal Equal Protection in School Financing Cases*, 7 N.Y.U. REV. OF L. & SOC. CHANGE 87, 89-91 (1979) [hereinafter cited as *Federal Equal Protection in School Financing Cases*]. See note 112 *infra* for a discussion of developments in the New York Public School Finance Law since *Levittown*.

65. 94 Misc. 2d at 478, 408 N.Y.S.2d at 610.

66. The court's only explanation for the joinder of plaintiff-intervenors is the statement that "a second group of plaintiffs sought and was granted the right to intervene in [the] action." *Id.* at 475, 408 N.Y.S.2d at 608.

67. *Id.* at 479-80, 408 N.Y.S.2d at 611.

68. *Id.* at 498, 408 N.Y.S.2d at 622.

69. *Id.*

70. *Id.* at 499, 408 N.Y.S.2d at 622.

71. *Id.* at 499-500, 408 N.Y.S.2d at 623. See also *Federal Equal Protection in School Financing Cases*, *supra* note 64, at 97-98.

72. 94 Misc. 2d at 511, 408 N.Y.S.2d at 630.

73. *Id.* at 512, 408 N.Y.S.2d at 631.

74. *Id.* at 513, 408 N.Y.S.2d at 631.

75. *Id.* See also *Federal Equal Protection in School Financing Cases*, *supra* note 64, at 99-101.

76. 94 Misc. 2d at 519, 408 N.Y.S.2d at 34. The original plaintiffs reserved this claim in the event that the Supreme Court revised its holding in *Rodriguez*.

fused to recognize education as a fundamental right. The court accepted, however, the argument advanced by plaintiff-intervenors that the finance statute failed to account for the municipal and educational overburdens incurred primarily by urban areas.

The "municipal overburden" argument was succinctly expressed early in the decision:

[t]he density of New York City's population, the condition of its housing stock and the deterioration of municipal facilities because of deferred maintenance all contribute to bringing about high non-educational expenditures. As these demands siphon off the City's revenues the percentage of revenue that can be allocated to education declines.<sup>77</sup>

The "educational overburden" argument was based upon the assumption that the urban school districts have the most difficult and expensive school populations to educate. The court found that these school districts, having the largest concentrations of "disadvantaged children requiring compensatory education,"<sup>78</sup> have been unable to meet the standard necessary to provide their students with an equal educational opportunity.

The failure of the New York legislature to take into account the existence of municipal and educational overburdens in enacting the school financing statute resulted in the creation of a classification of students by district. Such classification, according to the *Levittown* court, bore no reasonable relation to the purpose of the statute, which was to provide state aid to districts in proportion to their need,<sup>79</sup> and to equalize "the varying capabilities of the state's school districts to finance public education."<sup>80</sup> The court held, therefore, that the statute violated fourteenth amendment guarantees.

The *Levittown* court's holding may outwardly appear inconsistent with *Rodriguez*; upon closer examination, however, it is evident that the two decisions are not inconsistent.

While invalidating the New York law based upon the fourteenth amendment guarantees, the *Levittown* court notes that *Rodriguez* does not preclude a state court from holding that a finance scheme violates the fourteenth amendment because it establishes an irra-

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77. *Id.* at 498, 408 N.Y.S.2d at 622.

78. *Id.* at 510, 408 N.Y.S.2d at 629.

79. *Id.* at 530, 408 N.Y.S.2d at 640.

80. *Id.* at 529, 408 N.Y.S.2d at 641.

tional classification.<sup>81</sup> The *Levittown* court stated that "[t]he fact that the [Supreme] [C]ourt refused to apply the strict scrutiny test in *Rodriguez* does not mean that an educational statute's compliance with the Federal equal protection standards cannot be tested by a less rigorous standard of review."<sup>82</sup> The question to be asked then is "whether the challenged [statute] . . . rationally furthers a legitimate state purpose or interest."<sup>83</sup> In *Rodriguez*, the Supreme Court concluded that the purpose behind the Texas statute was to give individual school districts freedom to decide how much revenue would be raised for education and how the revenue raised would be spent.<sup>84</sup> The Supreme Court reasoned that because each local school district determined the tax rate to be levied within each district, the statute bore a reasonable relation to its purpose.<sup>85</sup> In *Levittown*, on the other hand, the legislative history of the 1974 state aid act indicates that the "overall concern" of the sponsors was the "equalization of educational opportunity for each pupil of the state and the provision of equitable special programs for pupils with special educational needs associated with poverty and handicapped conditions."<sup>86</sup> The New York statute was found to bear no rational relationship to this purpose.<sup>87</sup>

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81. *Id.* at 532, 408 N.Y.S. 2d at 642. For a comprehensive discussion of the propriety of the *Levittown* court's decision to apply the fourteenth amendment to public school finance cases, see *Federal Equal Protection in School Financing Cases*, *supra* note 64.

82. 94 Misc. 2d at 531, 408 N.Y.S.2d at 642.

83. 411 U.S. at 55.

84. *Id.* See note 13 *supra* and accompanying text.

85. 411 U.S. at 55.

86. TASK FORCE ON STATE AID FOR ELEMENTARY AND SECONDARY SCHOOLS, PROPOSAL FOR 1974 LEGISLATION ON STATE AID FOR ELEMENTARY AND SECONDARY SCHOOLS (1974).

87. On appeal in the instant case, the State of New York as petitioner has asserted in its brief that "public school finance laws in New York historically recognized the principle of local control and that this principle is rational in the face of equal protection challenges." See Brief for Petitioner at 89-93, *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978), *appeal docketed*, (App. Div. 2d Dep't Nov. 9, 1979). [hereinafter cited as Petitioner's Brief]. See also Supplemental Brief II for Petitioner at 24-36, *Board of Educ. v. Nyquist*, 94 Misc.2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978), *appeal docketed* (App. Div. 2d Dep't Nov. 9, 1979) [hereinafter cited as Supplemental Brief]. While there is considerable merit to petitioner's argument, it is evident from the legislative history of the 1974 statute that local control was just one goal of the act. The "overall concern", however, was the equalization of educational opportunity, and this statutory purpose distinguishes *Levittown* from *Rodriguez*.



## 2. State Equal Protection Argument

The *Levittown* court also reviewed the state aid formula under the state equal protection clause.<sup>88</sup> In considering whether the New York finance scheme violated state equal protection guarantees, the *Levittown* court rejected the argument advanced by plaintiffs that education was a fundamental right in New York and that the New York finance system created a "suspect classification" based on wealth.<sup>89</sup> On the other hand, it took the position that a "sliding scale" test was appropriate to determine the constitutionality of the New York statute.<sup>90</sup> Applying the sliding scale test,<sup>91</sup> the *Levittown*

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88. 94 Misc. 2d at 519-27, 408 N.Y.S.2d at 634-39. See also *Federal Equal Protection in School Financing Cases*, *supra* note 64, at 105-12.

89. 94 Misc. 2d at 520, 408 N.Y.S.2d at 635. The court cited *In re Levy*, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976) to support its conclusion. In *In re Levy*, the parents of certain handicapped children challenged a state statute which required them to pay for the maintenance costs incurred by the educational facilities which their children attended. The parents argued that the statute violated state equal protection guarantees because the parents of blind and deaf children did not have to pay for such maintenance costs. The *Levy* court, citing *Rodriguez*, concluded that education is not a "fundamental constitutional right." 38 N.Y.2d at 658, 345 N.E.2d at 558, 382 N.Y.S.2d at 15. The court, holding that the proper test to be applied was the rational basis test, concluded that "[a] rational basis does exist for the distinction made in relieving the parents of deaf children from any financial responsibility" as a matter of tradition and history. *Id.* at 658-59, 345 N.E.2d at 559-60, 382 N.Y.S.2d at 15-16. See note 91 *infra* on the issue of whether the rational basis test or a test approaching the strict scrutiny standard is appropriate for determining the validity of public school finance laws.

90. 94 Misc. 2d at 522, 408 N.Y.S. 2d at 636. The term "sliding scale" was selected by the *Levittown* court to characterize a test derived from an earlier case, *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S. 2d 82 (1976). In *Alevy*, a white applicant to medical school, who was denied admission, had suffered reverse discrimination in violation of the state equal protection clause. The applicant argued that the medical school practiced reverse discrimination by accepting minority students with less competitive academic records. 39 N.Y.2d at 328, 348 N.E.2d at 538, 384 N.Y.S.2d at 85. The *Alevy* court rejected the application of the strict scrutiny test. It held that education is not a fundamental right and that "benign discrimination" cases involving education should not be subject to strict judicial scrutiny. *Id.* at 332-33, 348 N.E.2d at 543, 384 N.Y.S.2d at 88. The court then analyzed the policy under the sliding-scale test, stating that the proper questions were: "whether the challenged discrimination satisfies a substantial state interest;" and if a substantial state interest is furthered, "whether the object being advanced by the policy could not be achieved by a less objectionable alternative." *Id.* at 336, 348 N.E.2d at 545-46, 384 N.Y.S.2d at 90.

91. The question whether a "sliding scale" test should be applied in a public school financing case is open to inquiry. The sliding scale test was applied in the reverse discrimination case of *Alevy*. See note 90 *supra*. The court declined, however, to apply the sliding scale test in *Levy*, the education case involving the state's obligation to pay for the maintenance of special residential facilities attended by handicapped children. See note 89 *supra*. The

court directed its inquiry toward two issues: first, "whether the challenged discrimination 'satisfies a substantial State interest,'"<sup>92</sup> and second, if a substantial state interest is involved, "whether the objectives being advanced by the policy could not be achieved by a less objectionable alternative."<sup>93</sup> Among the state's interests under the public school finance law, according to the court, were: to afford "all school children of the state equal educational opportunities in the elementary and secondary schools;"<sup>94</sup> and to remedy "inequalities in such educational opportunities that would exist because of lack of local resources unless the state furnished financial aid."<sup>95</sup> The court reasoned that because the state aid formula permitted disparities to exist in educational expenditures per pupil among districts, it did not further the state's interests.<sup>96</sup> The court concluded, therefore, that the state aid formula violated state equal protection guarantees.<sup>97</sup>

The court applied a rational basis test,<sup>98</sup> in addition to the sliding scale test, to determine whether the operation of the public school finance law was reasonably related to its purpose. It concluded that the present formula did not meet the less rigorous standard, stating, "[w]hile the intent and purpose of state aid is to correct and overcome [financial inequities experienced by property-poor school districts], the operative effect of the challenged state aid formula has been to perpetuate them."<sup>99</sup>

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*Levittown* court should have applied only a rational basis test, given the New York Court of Appeals' position to accord varying constitutional protection to students in education cases. See also Petitioner's Brief, *supra* note 87, at 27, wherein it is argued that the sliding scale test, applied in *Alevy*, is limited to the facts of that particular case. Petitioner argues that the rational basis test is appropriate in measuring "the validity of statutes regulating education in general and for those allocating resources among competing educational priorities in particular." *Id.*

92. 94 Misc. 2d at 522, 408 N.Y.S.2d at 636.

93. *Id.* at 522-23, 408 N.Y.S.2d at 636 (*citing Alevy*). Because the statute did not further a substantial state interest, the court did not specifically respond to the question whether "less objectionable alternatives" exist compared with the present state aid formula. Rather, the court held that it is the legislature's responsibility to consider alternative methods of funding public school education.

94. *Id.* at 529, 408 N.Y.S.2d at 636.

95. *Id.*

96. *Id.* at 524, 408 N.Y.S.2d at 637. The court again recognized that disparities in public expenditures create disparities in the quality of education.

97. *Id.* at 525, 408 N.Y.S.2d at 638.

98. *Id.*

99. *Id.* at 526, 408 N.Y.S.2d at 639.

The court also declared that under the rational basis test the finance law violated state equal protection guarantees by failing to take into account the municipal and educational overburdens experienced by urban districts. The court noted that two purposes behind the state aid formula were to equalize the varying capabilities among school districts to finance public education, and to provide aid to districts in proportion to their need.<sup>100</sup> Although the state aid statute purported to treat all districts equally, its failure to compensate the cities for their municipal and educational overburdens "resulted in overstating the capacity of such districts to finance public education and thereby classi[fied] them as less deserving of state aid."<sup>101</sup> This classification bears no reasonable relation to the statute's purpose, and was therefore held to be unconstitutional.

The *Levittown* court's decision to apply a rational basis test instead of a "suspect classification" analysis based on wealth eliminates the problems created in *Serrano*. The *Serrano* court, in holding that the California public school finance statute created a suspect classification, compelled the California legislature to adopt a fiscally neutral remedy. The *Levittown* court, on the other hand, in categorizing the discrimination created by the New York statute as irrational, remains silent on the question whether public school finance statutes should be fiscally neutral. The legislature is thereby free to establish a finance plan which permits wealth-related disparities among districts<sup>102</sup> if, as a result of legislative hearings and debates, such is found preferable.

### 3. Education Clause Argument

The *Levittown* court also invalidated the New York public school finance law based on the guarantees imposed by the education article of the New York State Constitution.<sup>103</sup> According to the court, the education clause demands that the state provide an educational

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100. See notes 79 & 80 *supra* and accompanying text.

101. 94 Misc. 2d at 530, 408 N.Y.S.2d at 641.

102. The same benefits accrue to the legislature as a result of the court's decision to apply a rational basis test to determine the validity of the act under the fourteenth amendment.

103. *Id.* at 527-29, 408 N.Y.S.2d at 639-40. The New York State Constitution guarantees that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI.

opportunity "appropriate" to a child's need.<sup>104</sup> The *Levittown* court held that, based upon evidence at trial, certain students who were enrolled in the New York public schools did not receive an educational opportunity appropriate to their needs. The court argued that students who reside in districts with lower property tax bases, for example, do not have access to such programs as advanced placement, foreign language, special speech or hearing classes.<sup>105</sup> The court noted particularly that the finance law was unconstitutional as it related to urban school districts. According to the court, the New York constitution mandated a public school system which gave "to all the State's school children the opportunity to acquire at least those basic skills necessary to function as a citizen in a democratic society."<sup>106</sup> The court held that the public school finance statute, by failing to give effect to the municipal and educational overburden borne by large districts, created "grossly disproportionate numbers and concentrations of pupils who are deficient in basic skills."<sup>107</sup>

Although there is support for the court's interpretation of the education article,<sup>108</sup> the *Robinson* experience is a warning that the legislature may incur difficulty and delay when required to establish a finance scheme which comports with a vague concept such as "an appropriate education."<sup>109</sup> Moreover, the *Robinson* experience teaches that a constitution's guarantees may be circumvented when

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104. 94 Misc. 2d at 527, 408 N.Y.S.2d at 639 (citing *In re Downey*, 72 Misc. 2d 772, 340 N.Y.S.2d 687 (Fam. Ct. 1973)). In *Downey*, the parents of a handicapped child sought complete state financial support for the child's education at a private institution because the state did not operate a public facility providing adequate special instruction. The *Downey* court interpreted the education article as placing a burden on New York State "to assure that the educational program provided each child is appropriate to his needs." *Id.* at 773, 340 N.Y.S.2d at 689. Based on this interpretation, the court granted petitioner's request for full state financial support. *Id.* See Petitioner's Brief, *supra* note 87, at 79 where it is argued that *Levy* invalidates the *Downey* court's interpretation of the education clause. Nothing in *Levy*, however, precludes interpreting the education clause as requiring that the state provide to each child an education appropriate to his needs.

105. 94 Misc. 2d at 528, 408 N.Y.S.2d at 640.

106. *Id.* at 528, 408 N.Y.S.2d at 640.

107. *Id.* at 533, 408 N.Y.S.2d at 643.

108. See note 104 *supra*.

109. See Dugan, *The Constitutionality of School Finance Systems Under State Law: New York's Turn*, 27 SYRACUSE L. REV. 573, 597-602 (1976), where the author highlights this problem and urges that the New York judiciary stay its hand in the entire area of public school finance reform.

a legislature is asked to comply with imprecise guidelines. The *Levittown* court should have interpreted the education clause restrictively,<sup>110</sup> while invalidating the finance statute exclusively on the basis of state equal protection guarantees.<sup>111</sup>

### III. Conclusion

Within the past decade, several states in the nation have amended public school finance laws in response to the widening gulf

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110. There is evidence that the *Levittown* court's interpretation of the education clause is out of step with recent holdings by the New York Court of Appeals. See *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1978). *Donohue* involved a claim that the officials of the plaintiff's former high school engaged in educational malpractice because plaintiff was allowed to graduate without having acquired rudimentary skills. The court declined to entertain a cause of action against a school district for educational malpractice, stating that the general directive of the education clause "was never intended to impose a duty flowing directly from a local school district to individual pupils to ensure that each pupil receives a minimum level of education. . . ." *Id.* at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377. Although the thrust of *Donohue* was directed to whether the school district could be held liable in tort for providing an inadequate education to its students, the "minimum level of education" language describes the nature of the education guarantee as interpreted by the New York Court of Appeals.

*Donohue* may not be relevant, however, to a public school finance case such as *Levittown*. The court held in *Donohue* that nothing in the opinion precludes courts from recognizing and correcting "gross violations of defined public policy." *Id.* at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378. See also *Hoffman v. Board of Educ.*, 49 N.Y.2d 121 (1979). *Hoffman* is another educational malpractice case brought by a plaintiff who alleged that the defendant Board of Education was responsible for negligently assessing plaintiff's intellectual capacity. Plaintiff was assigned for nearly a decade to a program for mentally retarded children although he was ultimately found not to be retarded. The Court of Appeals, upholding *Donohue*, embraced a restrictive interpretation of the education clause, holding "that the courts of this state may not substitute their judgment, or the judgment of a jury, for the professional judgment of educators and government officials actually engaged in the complex and often delicate process of educating the many thousands of children in our schools." *Id.* at 125-26. The court rejected plaintiff's claim. Although this case is not dispositive of whether the New York public school finance statute is unconstitutional, the decision does indicate that the New York Court of Appeals is increasingly de-emphasizing the significance of the education clause as a basis for obtaining relief in education cases.

111. At the conclusion of the decision, the court returned to a discussion of the educational article and the fourteenth amendment. Citing *Lau v. Nichols*, 414 U.S. 563 (1973), the *Levittown* court held that the New York public school finance statute violated the educational article and federal equal protection guarantees because its operation denied certain students a "meaningful opportunity to participate in the educational program" within the public schools. 94 Misc. 2d at 535, 408 N.Y.S. 2d at 644. *Lau* involved discrimination against Chinese-speaking pupils to the extent that only the English language was used by teachers in the California classrooms. The *Levittown* court was careful to note that *Lau* was decided upon the Civil Rights Act of 1964. This fact would suggest that *Lau* does not provide a strong constitutional basis upon which to invalidate the New York State public school finance law.

between the property-rich and property-poor districts.<sup>112</sup> Such amendments have not represented radical departures from previous public policy. Periodic amendments to public school finance statutes have been made where states have sought to fulfill their commitments to equality of educational opportunity.<sup>113</sup>

The appellate court reviewing *Levittown* should affirm the Nassau County trial judge's decision, insofar as it invalidated the public school finance statute based upon an equal protection analysis. In holding merely that the statute is unconstitutional because it operated in a manner not reasonably related to its purpose, the appellate court will avoid the problems presented by the *Serrano* and *Robinson* decisions. Most importantly, such a holding would leave the public school finance problem in the legislative arena. The New York legislature will then have an opportunity to debate, in the public light, whether the "overall concern" of public school financing should be the "equalization of educational opportunity" or the preservation of strict local control over all aspects of public education. Of course, the possibility exists that the legislature may not enact a system of finance which guarantees educational equality. The legislature enjoys that prerogative, however, where students are not afforded an unequivocal constitutional right to an equal education.<sup>114</sup>

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112. See 9 COLO. REV. STAT. ANN. §§ 22-50-101 to -118 (1978); FLA. STAT. ANN. §§ 236.012 to .68 (West Supp. 1979). See also N.Y. EDUC. LAW § 3602 (McKinney Supp. 1979), documenting the amendments to the New York public school finance law passed since the *Levittown* decision was handed down. Petitioner argues that the New York legislature has recently enacted a more equitable finance system making the *Levittown* decision moot. Supplemental Brief, *supra* note 87, at 1-2. The primary difference between the present finance statute and the statute considered in *Levittown* is the method by which state aid is distributed. The new law provides for a "percentage equalizing formula" whereby state aid is provided based upon the average annual real property wealth per pupil for the state. Petitioner argues that because the average is recomputed annually, the present finance system is more equitable than the foundation formula evaluated in *Levittown* which did not track annual changes in the average real property wealth per pupil. Local school districts can, however, under the present law continue to raise money in excess of the average amount per pupil and there is no express focus upon providing special aid to the cities. The appellate court will, of course, be faced with a somewhat different statute for review than the one considered by the Nassau County court. See generally N.Y. EDUC. LAW § 3602 (McKinney Supp. 1979); 1977-78 Cal. Stats. chs. 292, 894; N.J. STAT. ANN. §§ 18A: 7A-1 to 7A-33 (West Supp. 1979-1980).

113. See generally N.Y. EDUC. LAW § 3602 (McKinney Supp. 1979); 1977-78 Cal. Stats. chs. 292, 894; CONN. GEN. STAT. §§ 10-261 to -266d. (West Supp. 1979); 1977 Cal. Stats. chs. 292, 894.

114. See note 111 *supra* and accompanying text.

